IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID JOSEPH SMASAL, Appellant.	No. 37137-5-II UNPUBLISHED OPINION

Van Deren, C.J.—David Smasal appeals his convictions for malicious injury to railroad property,[1] first degree malicious mischief,[2] and attempted first degree theft,[3] arguing that the evidence was insufficient to support them.[4] We reverse and remand to vacate the convictions.

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[1] RCW 81.60.070.

[2] RCW 9A.48.070.

[3] RCW 9A.28.020; former RCW 9A.56.030 (2006).

[4] Smasal also challenges the jury instruction defining malicious injury to railroad property and argues both that his counsel was ineffective and that the trial court erred by failing to enter findings of fact under CrR 3.5. Because we hold that the evidence is insufficient to support any of the three convictions, we do not address these other issues. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

FACTS

On March 24, 2006, Jeffrey Ford, an engineer for Union Pacific Railroad, was assembling a train from separate rail cars at the Fife, Washington rail yard befor a Portland, Oregon run. Ford noticed a man lying motionless next to the railroad tracks with bundles of electrical wire nearby. Exposed wires were also lying across the man's body and Ford thought that he might have been electrocuted. But when Ford yelled, "Hey, are you okay?" the man sat up, said he was fine, and explained that he was just resting in the sun. Report of Proceedings (RP) (Oct. 3, 2007) at 15. Ford realized that the man was not a railroad employee and left to report him as a trespasser.

Ford knew that copper wire was a valuable commodity; two months earlier, vandals had stolen copper wire by cutting the railroad's overhead cables[5] that were attached to utility poles. As a temporary solution, Fife's signal maintenance foreman, Mike Espinosa, abandoned the dead cables and ran a live cable along the ground, connecting it to the overhead cable at both ends.

After returning to his train cab, Ford notified the yard operations manager and continued to watch the man on the ground. The man threw bolt cutters into the swamp next to the tracks. Ford then noticed that the overhead cables were bouncing and realized that a second man 80 to 100 feet away had draped cut wire over several cables and was attempting to pull the cables down. The first man's cable was one of the several cables that the second man was bouncing. After Ford made eye contact with the second man, the man turned and walked toward the rail yard exit.

[5] "A cable is a big neoprene covered unit that has . . . wires [inside] with brass sheeting and . . . neoprene on the outside." RP (Oct. 4, 2007) at 88.

The yard operations manager called police. Chief Bradley Blackburn and Officer Thomas Gow of the Fife Police Department found the first man stripping insulation from wires on the ground. Gow arrested him and identified him as Bradley Johnson. Meanwhile, Fife Police sent additional officers to locate the second man and gave his description over the radio. Sergeant William Loescher of the Puyallup Tribal Police Department soon arrested a man matching that description and identified him as David Smasal.[6] Ford identified Smasal as the second man he had observed in the rail yard.

The State charged Smasal with first degree malicious mischief, attempted first degree theft, and malicious injury to railroad property. The jury convicted Smasal as charged. At the sentencing hearing, defense counsel unsuccessfully moved for arrest from judgment under CrR 7.4(a)(3)[7] and for new trial under CrR 7.5(a)(7) and CrR 7.5(a)(8),[8] arguing that the evidence was insufficient to support the convictions.

Smasal appeals.

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[6] Loescher was a lieutenant by time of trial.

[7] CrR 7.4(a)(3) provides, "Judgment may be arrested on the motion of the defendant for . . . insufficiency of the proof of a material element of the crime."

[8] CrR 7.5(a) states:

> The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
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> . . . .
>
> (7) That the verdict or decision is contrary to law and the evidence; [and]
>
> (8) That substantial justice has not been done.

ANALYSIS

Sufficiency of the Evidence

Smasal argues that the evidence is insufficient to support his three convictions. We agree.

A. Standard of Review

When evaluating the sufficiency of the evidence, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.'"[9] *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We treat direct and circumstantial evidence as equally reliable and we "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

"If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. 'Retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy.'" *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (citation omitted) (internal quotation marks omitted) (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

B. Malicious Injury to Railroad Property

[9] Whether we characterize Smasal's argument as appealing the trial court's posttrial denial of his insufficiency motions or as a claim of insufficiency raised for the first time on appeal, we apply the same standard of review. *See State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000).

Smasal first claims that the State's evidence was insufficient to support a conviction for malicious injury to railroad property. He specifically contends that, under the law of the case, the State had the burden of proving that he actually "endangered the safety of any engine, motor, car, or train, or any person thereon" based on the "to convict" instruction and that the State failed to do so.[10] Br. of Appellant at 11 (quoting Clerk's Papers (CP) at 43). We agree.

Our legislature describes the crime of malicious injury to railroad property as follows:

> Every person who, in such manner as might, if not discovered, endanger the safety of any engine, motor, car or train, or any person thereon, shall in any manner interfere or tamper with or obstruct any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure, or appliance pertaining to or connected with any railway, or any train, engine, motor, or car on such railway . . . is guilty of a class B felony and shall be punished by imprisonment in a state correctional facility for not more than ten years.

RCW 81.60.070. The parties do not cite, and our review did not disclose, any Washington case interpreting this statute; no pattern jury instructions address this crime.

The trial court gave the jury the following "to convict" instruction proposed by Smasal:

> To convict the defendant of the crime of malicious injury to railroad property, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about the 24th day of March, 2006, *the defendant endangered the safety of any engine, motor, car, or train, or any person thereon*; and
>
> (2) Did interfere or tamper with or obstruct a switch, rail, roadbed, structure, or appliance pertaining to or connected with a railway, train, engine, motor, or car on such railway; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

[10] Smasal correctly notes that the jury had no instructions regarding accomplice liability. At oral argument, the State conceded that it did not try Smasal as an accomplice and argued that the evidence was sufficient to prove actual endangerment and convict him under the statute as a principal.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 43 (emphasis added).

"[J]ury instructions not objected to become the law of the case." For criminal trials, "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction" and a defendant may challenge the sufficiency of the evidence to support any added elements. *Hickman*, 135 Wn.2d at 102. Because the State did not object to this instruction, it accepted the burden of proving that Smasal actually "endangered the safety of any engine, motor, car, or train, or any person thereon." CP at 43.

The transitive verb "endanger" means "to bring into danger or peril of probable harm or loss : imperil or threaten danger to" a person or object.[11] Webster's Third New International Dictionary 748 (2002) (emphasis omitted). The State argues that Smasal's tampering with the main communication cables could have created a dangerous situation by knocking out the rail yard's ability to communicate with its trains or potentially electrocuting someone.[12]

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[11] The State suggests that the stature uses "endanger" as an intransitive verb which has a more forgiving definition, "to create a dangerous situation." Br. of Resp't at 9 (quoting Webster's Third New International Dictionary 748 (2002)). But the legislature wrote "endanger *the safety of any engine*" and thus used "endanger" as a transitive verb, that is, one "requir[ing] an object to express a complete thought." RCW 81.60.070 (emphasis added); The Chicago Manual of Style § 5.98, at 172 (15th ed. 2003). Smasal correctly cites the transitive definition that we adopt.

[12] The State suggests that hazardous materials on Ford's train somehow could have escaped if another train collided into it and that Smasal should also be criminally liable for creating this danger. But no witnesses testified about the storage, maintenance, and security precautions involved and the State presented no evidence that knocking out the signaling lines created a probability of such an escape.

Although the legislature required only that the State prove that the conduct might endanger a person or thing, the "to convict" jury instruction here required proof of actual endangerment. *See* RCW 81.60.070; *Hickman*, 135 Wn.2d at 102-03. Therefore, although we view the evidence and reasonable inferences in the light most favorable to the State, the evidence must show that Smasal's actions endangered the safety of any engine, motor, car, or train, or any person thereon. *See Salinas*, 119 Wn.2d at 201; *Rempel*, 114 Wn.2d at 82.

Here, cuts in the live cable running along the ground halted the signaling system. Accordingly, engineers had to reduce their trains' speed by one half or one third and rely on the dispatcher for oral instructions over the affected tracks, slowing the pace of train commerce. But even interpreting the evidence most strongly against Smasal, the State failed to introduce evidence that Smasal created any probability of harm or loss to any person or train. Instead, the evidence only demonstrated that Ford's train was delayed and other trains running through Fife, if any,[13] would have also run behind schedule. And nothing in the record suggested that Smasal ever had the tools necessary to cut the cables.

Moreover, Ford saw Smasal pulling on entirely separate cables, namely, the overhead, nonfunctional ones. Although the utility pole had one functioning communication cable from the Fife rail yard to the Tacoma communication building, it was lower than the other cables, so Smasal could not have touched it when he hung on the group of cables. And the State presented no evidence that the lower communication cable was part of the track signaling system. Therefore, we hold that insufficient evidence supported Smasal's conviction for malicious injury

[13] The State presented no witnesses or evidence indicating that other trains were travelling through Fife that afternoon.

to railroad property.

C. First Degree Malicious Mischief and Attempted First Degree Theft

Smasal next contends that the evidence was insufficient to support his convictions for first degree malicious mischief and attempted first degree theft because the State failed to prove that Smasal's damage exceeded $1,500. We agree.

First degree theft and first degree malicious mischief both involve property valued over $1,500. RCW 9A.48.070; former RCW 9A.56.030(1)(a). "'Value' means the market value of the property or services at the time and in the approximate area of the criminal act." Former RCW 9A.56.010(18)(a) (2006). The jury instructions required jurors to find that Smasal caused damage that included any "breaking and . . . any diminution in the value of any property as a consequence of an act." CP at 32.

The State argues that the live cable's value was $2,640 and that the railroad paid $8,000 in labor costs to hang a new cable. But the evidence here does not support a finding that Smasal ever touched the live cable running along the ground and Espinosa testified only about that cable's value. While the record is clear that someone severed the live cable and disrupted the signaling system, witnesses only saw Johnson with the tool to do this and the State cannot rely on Johnson's actions to convict Smasal as a principal. Therefore, without evidence of damage to the cables on which Smasal was pulling, we hold that insufficient evidence supported Smasal's convictions for first degree malicious mischief and attempted first degree theft.

We reverse and remand to vacate the convictions.

A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Bridgewater, J.

Penoyar, J.